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Supreme Court of the United States

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 676

JOHN C. STARNES,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the Eastern District of New York is reported in 295 F. 2d 704. The opinion of the United States District Court is reported in 26 F.R.D. 625.

Jurisdiction

The petitioner invokes the jurisdiction of this Court under Title 28 U.S.C. § 1254 (1).

Question Presented

Whether or not certiorari should be granted to review a judgment of the Court of Appeals for the Second Circuit which affirmed a judgment of the District Court in favor of the respondent which dismissed an FELA action pursuant to Rule 25(a) (1) of the Federal Rules of Civil Procedure for failure to effect substitution of proper party within two years after the death of the plaintiff.

ARGUMENT

The ruling of the Court of Appeals for the Second Circuit is in conformity with the ruling and policy of the Supreme Court.

The petitioner seeks the granting of a writ of certiorari in this case upon the ground that the decision of the Circuit Court below in the instant case is directly in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Perry* v. *Allen* (1956), 239 F. 2d 107.

What the petitioner does not point out is that the decision of the Court of Appeals for the Second Circuit in the instant case is in conformity with the ruling and policy of this Court and that the decision of the Court of Appeals for the Fifth Circuit is at variance with such ruling and policy.

In the case of *Anderson* v. *Yungkau* (1947), 329 U. S. 482, this Court affirmed the judgments of the Circuit Court (Sixth Circuit) and the District Court which denied motions to revive certain actions against certain parties and to substitute their legal representatives more than two years after the deaths of the original parties, and dismissed the actions under Rule 25(a) of the Federal Rules of Civil Procedure. In that case the Court, in the course of its opinion, per Mr. Justice Douglas, held at page 485:

> "Thus, as stated by the Circuit Court of Appeals, Rule 25(a) operates both as a statute of limitations upon revivor and as a mandate to the court to dismiss an action not revived within the two-year period."

In the petition before this Court, the petitioner argues that *Anderson* v. *Yungkau*, *supra*, is no longer authority for sustaining the dismissal in this case inasmuch as the Supreme Court, in the course of its opinion in that case, stated that Rule 25(a) was based in part on 28 U.S.C. § 778, 42 Stat. 352, which limited the power of substitution to two years from the death of a party, and that inasmuch as that Statute, to wit, 28 U.S.C. § 778, was repealed by the Judicial Code of 1948, Rule 25(a) no longer has statutory authority on which to be based and cannot validly operate as a statute of limitations.

However, the explanation of the House Judiciary Committee for the repeal of 28 U.S.C. § 778 and its omission from the Judicial Code of 1948 was that it was superseded by Rules 25 and 81 of the Rules of Civil Procedure [H. Rep. No. 308 to accompany H. R. 3214 (80th Cong., 1st Sess. 1947, p. A. 289)].

Further, the Court of Appeals for the Second Circuit in *Iovino* v. *Waterson* (1959), 274 F. 2d 41, stated, per Friendly, Circuit Judge, at page 46:

> "We think it would be a reversion to the formalism of a bygone age to hold that the repeal of 28 U.S.C. § 778 by the Revision Act for the stated reason that Fed. R. Civ. Proc. 25(a) (1) rendered § 778 unnecessary invalidated the very Rule whose existence was the avowed reason for the repeal. On the contrary, this action of Congress seems to evidence its belief in the consistency of the Rule with the Enabling Act. Moreover, whatever the applicability of an 'outcome determinative' test to a conflict between Federal and state practice in diversity litigation may be, it would

unduly restrict the grant of authority made by Congress to hold that a rule contravenes the Enabling Act as abridging, enlarging or modifying substantive rights merely because a provision admittedly procedural in nature either furthers or prevents the enforcement of such rights. For example, Fed. R. Civ. Proc. 37 provides that in the event of refusal to comply with discovery requests the court may make an order 'refusing to allow the disobedient party to support or oppose designated claims or defenses * * *' Nothing could be better calculated to prevent the ultimate vindication of a 'substantive right'; yet surely this Rule is within the scope of the power conferred by Congress. Cf. Sibbach v. Wilson & Co., 1941, 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479."

It is interesting to note that this Court had an opportunity to review this question by granting a writ of certiorari in the *Iovino* case, but denied the petition for writ of certiorari in *Carlin, Admx. v. Iovino*, 362 U. S. 949.

Furthermore, as pointed out by Judge Mishler in his District Court opinion in this case:

"It is significant to note, however, that the Supreme Court failed to adopt the final report of October 1955, of the Advisory Committee with respect to the proposed amendment of Rule 25."

This amendment would have eliminated the two-year time limitation contained in Rule 25(a), and required merely that the substitution be made within a reasonable time (18 F.R.D. 112).

It is respectfully submitted that in this action brought under the provisions of the Federal Employers' Liability Act, Title 45 U.S.C. Sec. 51 *et seq.*, Rule 25(a) clearly comes within the power prescribed by Title 28 U.S.C. Sec. 2072 whereby:

> "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions."

It is respectfully submitted that the holding of this Court in *Anderson* v. *Yungkau* is still the law. The instant case is a much stronger case for the application of the Rule than the *Anderson* case. In the *Anderson* case, the Court noted on page 483 that the failure to make application within the two-year period was not due to lack of diligence, since

> "• • • petitioner failed to learn of these facts until more than two years later."

In the instant case the death of the plaintiff was known to plaintiff's attorneys long before the expiration of the two-year period after plaintiff's death and, as a matter of fact, limited letters of administration were issued prior to the expiration of such two-year period of time. District Judge Mishler found that:

> "In the case at bar, there is nothing in the conduct of the defendant from which can be fashioned a waiver of the limitation or an estoppel to invoke the rule. At best, the plaintiff has shown excusable neglect."

CONCLUSION

It is respectfully submitted that, there being no basis for the writ, the petition should be denied.

Respectfully submitted,

David J. Mountan, Jr.,
Attorney for Respondent.

James S. Rowen,
With him on the Brief.